



## King's Research Portal

*Document Version*  
Peer reviewed version

[Link to publication record in King's Research Portal](#)

*Citation for published version (APA):*

Pils, E. (2018). In whose service? The transnational legal profession's interaction with China and the threat to lawyers' autonomy and professional integrity. *Fordham International Law Journal*, 41(5), 1263-1292.  
<https://ir.lawnet.fordham.edu/ilj/vol41/iss5/8/>

### **Citing this paper**

Please note that where the full-text provided on King's Research Portal is the Author Accepted Manuscript or Post-Print version this may differ from the final Published version. If citing, it is advised that you check and use the publisher's definitive version for pagination, volume/issue, and date of publication details. And where the final published version is provided on the Research Portal, if citing you are again advised to check the publisher's website for any subsequent corrections.

### **General rights**

Copyright and moral rights for the publications made accessible in the Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognize and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the Research Portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the Research Portal

### **Take down policy**

If you believe that this document breaches copyright please contact [librarypure@kcl.ac.uk](mailto:librarypure@kcl.ac.uk) providing details, and we will remove access to the work immediately and investigate your claim.

## **In whose service? The transnational legal profession's interaction with China and the threat to lawyers' autonomy and professional integrity**

Eva Pils, King's College London\*

When in May 2016 Peng Jiyue, a Chinese lawyer employed by the Chinese part of the international law firm Dentons Dacheng, undertook to represent the family of [Lei Yang](#), a young environmental activist who had died in police custody under suspicious circumstances, it was an act of kindness, partly motivated by friendship with the family. He was not formally appointed in writing but he accompanied the family to view the bruised body and started helping them by calling for an independent autopsy, since the authorities claimed that Lei had died of a heart attack during a raid on a brothel, whereas his friends and family thought he had been beaten to death as a result of his fervent activism.<sup>1</sup>

A few days later, Lawyer Peng abruptly withdrew from the case. Shortly after the lawyer's withdrawal, other lawyers from the same firm took on the representation of the police officers alleged to bear direct responsibility in Lei's death. Subsequently, another lawyer, Chen Youxi, started representing the family. Reportedly due to great pressure brought to bear on the family, a [settlement](#) between the police and the family led to the dropping of charges against the officers in question.<sup>2</sup>

This sequence of events led the public to question [whether Dentons might be implicated](#) in what appeared to be a case of conflict of interest.<sup>3</sup> There was also the question why Lawyer Peng had withdrawn in the first place. Did this happen following a request by the authorities? Much was left to speculation, and the concerns that had been raised were not, apparently, followed up. The incident illustrated, at any rate, how problematic operating in the Chinese legal system can be, and suggested a number of ways in which this system might pose threats to lawyers' autonomy, as well as their professional integrity.

The autonomy and integrity of the legal profession have long been understood as a cornerstone of the rule of law, and lawyers have been [important actors in the struggle for more open societies](#) in many places.<sup>4</sup> The U.S., continental European nations, and the UK have had longstanding practices of trying to export rule of law 'best practice' models, training key actors in the legal system such as judges, lawyers, prosecutors and the police; and interacting at governmental and civil society levels with partners in authoritarian jurisdictions such as China. The professional bodies representing the legal profession, such as the Law Society of England and Wales and the Bar Council in the UK, have long interacted with the All China Lawyers' Association and its local branches to promote rule of law through improvements for the legal profession.

---

\* Reader (associate professor) in Transnational Law, King's College London; non-resident senior research fellow, NYU U.S.-Asia Law Institute. The author would like to thank an anonymous current LL.B. student at King's College London for excellent assistance provided in the initial stages of this research, and the KURF undergraduate research scheme at King's College London for supporting his research. Many thanks to Terry Halliday, Aruna Nair and Gearóid Ó Cuinn for most helpful comments and suggestions.

<sup>1</sup> Anne Henochowitz, 'Minitrue: Man dies in Beijing Police Custody,' China Digital Times, 10 May 2016, <https://chinadigitaltimes.net/2016/05/minitrue-beijing-man-dies-police-custody/>; Li Fangping Weibo post dated 28 June 2016 discussing this case, available at [http://www.weibo.com/1786822605/DCibt6ZYI?type=comment#\\_rnd146745153140](http://www.weibo.com/1786822605/DCibt6ZYI?type=comment#_rnd146745153140).

<sup>2</sup> Samuel Wade, 'Lei Yang Case Closure Stirs Discontent,' China Digital Times, 29 December 2016, <https://chinadigitaltimes.net/2016/12/lei-yang-case-closure-related-censorship-stir-discontent/>.

<sup>3</sup> Dentons accused of conflict of interest over Chinese corpse, *Rollonfriday*, 8 July 2016, <http://www.rollonfriday.com/TheNews/EuropeNews/tabid/58/Id/4660/fromTab/58/currentIndex/58/Default.aspx>.

<sup>4</sup> Terence C. Halliday, Lucien Karpik and Malcolm Feeley, 'Introduction -- The Legal Complex in Struggles for Political Liberalism,' 140, at [http://www.lexglobal.org/files/023\\_halliday\\_karpik\\_feeley\\_introduction--the\\_legal\\_complex.pdf](http://www.lexglobal.org/files/023_halliday_karpik_feeley_introduction--the_legal_complex.pdf).

Against the wider background of collaboration, foreign governments, legal professional bodies, and entities working with them have also not shied away from criticising the Chinese government (and other governments) for persecuting human rights lawyers. For example, in the wake of the wave of a crackdown that began in July 2015, the United Kingdom's Bar Human Rights Committee issued a [joint statement](#) condemning the crackdown for its flagrant violations of human rights standards.<sup>5</sup> The Committee's letter detailed these violations and drew attention to the 'significant implications' these cases had for the rule of law and exercise of the legal profession in China.<sup>6</sup> Such engagement is very commendable; and it is important that it continue, not least because the situation has never been worse for China's human rights lawyers. The latest crackdown on human rights lawyers, discussed later on, has made this entirely clear: it has seen hundreds of lawyers and their assistants detained and questioned, as well as several held incommunicado for long periods, tortured, and publicly paraded 'admitting guilt' and expressing repentance.

But to be effective, commitment to the excellent standards invoked here should be demonstrated throughout the legal profession's engagement with colleagues in authoritarian systems. China's human rights lawyers are part of – in relative terms – a tiny group of legal professionals whose situation is especially dire; but their predicaments reflect problems of the legal profession more widely. Party-State control of the legal profession is pervasive, and repression of forceful rights advocacy is inherent to the political-legal system. When international firms go to China, do they buy into such repression? When Chinese firms go abroad, do their lawyers bring repressive regulatory demands and practices with them?

Up to a point. In the following, a few key aspects of control of the legal profession in China are listed. I argue that the autonomy of the legal profession, the lawyer's duty (under UK rules) to uphold the autonomy of the law, and the ability of law firms and lawyers to keep client information confidential are systematically undermined by the regulatory scheme international firms practicing in China subscribe to, and that this has further implications under international law standards. In addition, weak rule of law and extra-legal, illegal or even criminal Party-State interference with legal practice can also, at least indirectly, affect the international legal profession, and end up implicating lawyers in the human rights violations of the Party-State. Having said this, I acknowledge that many problems remain obscure. Attempting to discuss the nexus between 'big law' and human rights lawyer persecution in authoritarian countries is an attempt to lift the lid of a very large black box. The analysis that follows will in parts consist in a study of available rules, and in part rely on hypothesising, rather than proving, likely facts. A wider, systematic, evidence-based study of this issue is as yet outstanding.

### ***Domestic victimhood and complicity***

Domestically, the legal profession is subject to stringent controls, most importantly through a licencing system that is maintained by the Ministry of Justice (MoJ), aided by the All China Lawyers' Association (ACLA), in accordance with the 2007 Law on Lawyers and further regulations. Neither the MoJ nor the ACLA, which claims to be a self-regulatory body, ACLA and its local branches, are autonomous but, rather, subject to Party-State controls. As argued in the following, all organisations of the legal profession, including individual law firms, come within the reach of Party-State control and are therefore potentially both victims

---

<sup>5</sup> 'An Open Letter by Legal Professionals To President Xi Jinping On the Occasion of the anniversary of the 709 Crackdown,' January 2017 available at <file:///C:/Users/Eva/Downloads/Open-Letter-to-Xi-Jinping.pdf>. More Bar Human Rights Committee statements on China are available at <http://www.barhumanrights.org.uk/country/China/>.

<sup>6</sup> *Ibid.*

and complicit (if at times reluctant) supporters of a governance system designed to repress activist and human rights defence orientated lawyering. The system of control of the legal profession is similar to other control systems, not least in that it deliberately uses mechanisms of ‘relational repression’ to achieve comprehensive control.<sup>7</sup>

To obtain a licence to practice, lawyers must not only fulfil professional requirements but also [swear allegiance to the Party](#), as well as to the rule of law.<sup>8</sup> Lawyers operate under an ethics code issued by ACLA, the ‘[Basic Rules on Lawyers' Professional Ethics](#),’ according to whose Article 1 they ‘*shall be firm in the ideal and belief in socialism with Chinese characteristics, adhere to the essential attribute of the socialist lawyer system with Chinese characteristics, uphold the party's leadership and the socialist system, and consciously uphold the dignity of the Constitution and the law.*’<sup>9</sup> As [the Party itself](#) and [scholars commenting on these developments](#) have pointed out, ‘maintaining the leadership’ of the Communist Party of China (CPC) is increasingly a ‘fundamental requirement’ of the Party’s conception of law.<sup>10</sup> Genuine rule of law reform, understood as a project enhancing control of public power and the protection of fundamental rights is [increasingly in jeopardy](#), as recent commentary from Supreme People’s Court President Zhou Qiang illustrated. The judiciary ‘should resolutely resist,’ he said, ‘[erroneous influence from the West: “constitutional democracy,” “separation of powers” and “independence of the judiciary,” \[and\] make clear our stand and dare to show the sword.](#)’<sup>11</sup> In other words, becoming a lawyer in China is premised on committing to upholding a political-legal system that lies well outside the normative framework of current public international law which, inter alia, includes [Basic Principles on the Role of Lawyers](#) and commitments to protecting [Human Rights Defenders](#).<sup>12</sup>

To keep their licence, licenced Chinese lawyers must pass an annual re-assessment, which examines their overall performance, also in terms of political conformity criteria. Law

---

<sup>7</sup> Deng, Yanhua and O’Brien, Kevin, ‘Relational Repression in China: Using Social Ties to Demobilize Protesters,’ 215 *China Quarterly* (September 2013), pp. 533-52.

<sup>8</sup> Siweiluozi’s Blog, ‘New Pledge of Allegiance for Chinese Lawyers,’ 21 March 2012, <http://www.siweiluozi.net/2012/03/new-pledge-of-allegiance-for-chinese.html>.

<sup>9</sup> 律师职业道德基本准则 [Basic Principles of Lawyer’s Professional Ethics], issued by the All China Lawyers’ Association, 2 June 2015, <http://www.dffyw.com/faguixiazai/ssf/201506/38582.html>.

<sup>10</sup> CCP Central Committee Decision concerning Some Major Questions in Comprehensively Moving Governing the Country Forward According to the Law (28 October 2014) (党的领导和社会主义法治是一致的，社会主义法治必须坚持党的领导，党的领导必须依靠社会主义法治) (translated by China Law Translate, ‘CCP Central Committee decision concerning several major issues in comprehensively advancing governance according to law’, 28 October 2014, available at <http://chinalawtranslate.com/fourth-plenum-decision/?lang=en>); Chongyi Feng, ‘Chinese socialist rule of law – a critical appraisal of the relationship between the Communist Party and Comprehensive law reform,’ in John Garrick and Yan Chang Bennett, *China’s socialist rule of law reforms under Xi Jinping*, Routledge, Abingdon, 2016, 45-58, <https://books.google.co.uk/books?id=rjV-CwAAQBAJ&pg=PA45&lpg=PA45&dq=Chongyi+Feng,+%E2%80%98China%E2%80%99s+Socialist+Rule+of+Law&source=bl&ots=Jg8mIJAAtLY&sig=U5ukR1B5BA7f0vt7T21dTYjd5w&hl=en&sa=X&ved=0ahUKEwjHtcab-bzRAhVED8AKHTs0Db4Q6AEIzAC#v=onepage&q=Chongyi%20Feng%2C%20%E2%80%98China%E2%80%99s%20Socialist%20Rule%20of%20Law&f=false>.

<sup>11</sup> Michael Forsythe (18 January 2017), ‘China’s Chief Justice Rejects an Independent Judiciary, and Reformers Wince,’ *The New York Times*, [https://www.nytimes.com/2017/01/18/world/asia/china-chief-justice-courts-zhou-qiang.html?\\_r=0](https://www.nytimes.com/2017/01/18/world/asia/china-chief-justice-courts-zhou-qiang.html?_r=0)

<sup>12</sup> United Nations Congress on the Prevention of Crime and the Treatment of Offenders, ‘Basic Principles on the Role of Lawyers’, 7 September 1990, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>; United Nations General Assembly, ‘Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms’ (8 March 1999), available at <http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>.

firms are subject to a separate licencing system. As has been widely documented, assessment and re-assessment of lawyers serve, *inter alia*, the function of controlling any political activity by lawyers.<sup>13</sup> Numerous cases of lawyers or law firms having their licences suspended or revoked because they handled ‘sensitive’ cases or brought certain legal challenges against the authorities have been documented, for example that of Liu Wei and Tang Jitian.<sup>14</sup> Due to the overwhelming and paramount position of the Party, some of the problematic lawyer conduct mentioned earlier on results from their dependence on ‘Party leadership.’

For example, upholding the party’s leadership may mean that a law firm might tell its lawyer that they must refuse to accept instructions for a client at the behest of a Party-State official, that is, for improper reasons. Lawyers have shared their early experience of such practices: in 2004 in eloquent testimony, detailing how first the authorities and then their own law firm bosses might instruct them not to represent a ‘politically sensitive’ client.<sup>15</sup>

The criminal justice system, too, has been used to control lawyers, who have historically been charged with crimes affecting the integrity of the judicial process, public order and national security, including ‘falsifying evidence,’ ‘obstructing public office,’ ‘gathering a crowd in a public place to obstruct order’ and (‘inciting) subversion of State power or overthrow of the socialist system.’<sup>16</sup> As early as 2011, a lawyer commented,

‘As long as you engage in rights defence, you may, superficially speaking, act within the law; but the government will never see it that way: for them, you attack them and shake their legitimacy (*dongyao ta de hefaxing*).’<sup>17</sup>

One of the key provisions that has been used to prosecute lawyers is Article 306 of the Criminal Law (CL),<sup>18</sup> which provides for criminal punishment of lawyers who falsify or suppress evidence or instruct their clients to falsify or suppress evidence. The main problem with Article 306 CL has been the targeting of lawyers in a retaliatory way for trying to challenge the prosecution’s evidence e.g. by producing witness statements contradicting those of the prosecution, or challenging the reliability of confessions; and the provision is widely held to have produced a chilling effect.<sup>19</sup>

<sup>13</sup> Eva Pils, *China’s Human Rights Lawyers: Advocacy and Resistance*, Routledge, Abingdon, December 2014, chapter 5.

<sup>14</sup> He Yang, *Disbarment* (吊照门) (independent documentary film, 2010).

<sup>15</sup> China Human Rights Lawyers Concern Group website, <http://www.chrlawyers.hk/en/content/%E9%A6%96%E9%A0%81> Further examples are discussed in Pils, Chapter 5, which also discusses the problematic regulations requiring lawyers to submit information on their handling of ‘sensitive’ cases to the authorities.

<sup>16</sup> Teng Biao, ‘The Political Meaning of the Crime of “Subverting State Power”,’ translated from the Chinese by Pinky Choy and Eva Pils, in Jean-Philippe Béja, Fu Hualing and Eva Pils, *Liu Xiaobo, Charter 08 and Challenges of Political Reform in China*, Hong Kong University Press, Hong Kong, 2012.

<sup>17</sup> #21 2011-2 30. In Chinese characters, 动摇它的合法性.

<sup>18</sup> Article 306 CL: If, in criminal proceedings, a defender or agent ad litem destroys or forges evidence, helps any of the parties destroy or forge evidence, or coerces the witness or entices him into changing his testimony in defiance of the facts or give false testimony, he shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years.

Where a witness’s testimony or other evidence provided, shown or quoted by a defender or agent ad litem is inconsistent with the facts but is not forged intentionally, it shall not be regarded as forgery of evidence. CECC translation at <http://www.cecc.gov/resources/legal-provisions/criminal-law-of-the-peoples-republic-of-china>, accessed on 25 December 2013. Article 307 CL (*ibid*), addresses non-lawyers and stipulates different rules for charges against them, creating bias.

<sup>19</sup> To quote, ‘An All China Lawyers’ Association officer, who asked not to be named, said in the 10 years after the clause was introduced in 1997, at least 200 lawyers had been detained under clause 306. At least half were



Following the adoption of increasingly principled, autonomous and vocal advocacy practices by some lawyers, the authorities have tightened controls and the Party has sought to strengthen its role within law firms. This process, which could be observed throughout the Reform and Opening era, accelerated under the leadership of Xi Jinping, which as I have argued elsewhere, sought to change the direction of legal reform: it abandoned the paradigm of gradual transition to a more liberal system, and instead introduced explicitly anti-liberal changes. These changes have re-emphasised Party control of the law, and weakened rule of law protections;<sup>20</sup> most recently, they have resulted in constitutional revisions that enable Xi to stay in power without term limitations, while also enshrining his thought as guiding in the text of the Constitution.<sup>21</sup>

The shift toward anti-liberal law initiated under Xi Jinping has had momentous consequences for all actors in the legal system, including in particular lawyers, whose fundamental role made them particularly vulnerable to being perceived as potential irritants and challengers. This shift is reflected, *inter alia*, in what Ahl has termed the ‘politicisation of China’s judicial examination.’<sup>22</sup> At the level of legal rules, it became important to widen the mechanisms that allowed the authorities to outlaw and vilify ‘rights lawyers’ as troublemakers and rabble-rousers. For example, Article 309 of the Criminal Law, as revised in 2015, prohibits

‘insulting, defaming or threatening judicial personnel or litigation participants, and not heeding the court’s admonitions, seriously disrupting courtroom order’ as well as ‘other conduct seriously disrupting court order.’<sup>23</sup>

A Ministry of Justice [Regulation on the Management of Law Firms](#), moreover, requires Chinese law firms to ensure that the lawyers on their staff not engage in too-vocal advocacy or political speech. They must ensure, *inter alia*, that their lawyers do not

‘publish distorting or misleading information on cases handled by themselves or others, or maliciously hype up cases,... [that they not] put pressure on the authorities and attack legal authorities or undermine the legal system by setting up groups, producing joint letters, or by publishing open letters;’... [that they not] ‘humiliate, defame, threaten or beat judicial personnel or participants in a litigation, *or engage in denial of the state-determined nature of an evil sect organisation or other conduct seriously disrupting court order* [sic];’ ...[and that they not] ‘publish or disseminate speech that denies the political order laid down in the Constitution, denies

---

proven innocent or not prosecuted, but those convicted faced jail terms and were disbarred for life.’ Ng Tze-wei, ‘Until clause goes, defence lawyers are just decoration,’ *South China Morning Post*, 7 July 2011 at <http://www.scmp.com/article/972741/until-clause-goes-defence-lawyers-are-just-decoration>

;Mao Lixin (毛立新), ‘律师伪证罪的追诉程序探析 [Analysis of the handling of crimes of falsification of evidence by lawyers],’ 30 August 2011 at [http://blog.sina.com.cn/s/blog\\_4e7afe890102dssf.html](http://blog.sina.com.cn/s/blog_4e7afe890102dssf.html); Ran Yanfei, ‘When Chinese Criminal Defense Lawyers Become the Criminals,’ (32) *Fordham International Law Journal* (2009) 986, at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2152&context=ilj>.

<sup>20</sup> Eva Pils, ‘The Party and the Law,’ in Willy Lam (editor), *Handbook on the Chinese Communist Party* (Routledge, Abingdon: 2017), 248-265.

<sup>21</sup> Jerome A. Cohen, ‘Xi Jinping amends China’s Constitution,’ *Jerry’s Blog*, 8 March 2018, <http://www.jeromecohen.net/jerrys-blog/2018/3/8/xi-jinping-amends-chinas-constitution>.

<sup>22</sup> Bjoern Ahl, ‘The Politicization of the Chinese National Judicial Examination, 2007–2012,’ *Modern China*, 2017, <http://journals.sagepub.com/doi/pdf/10.1177/0097700417737720>.

<sup>23</sup> China Law Translate, ‘People’s Republic of China Criminal Law (amended 2015),’ English version at <http://chinalawtranslate.com/%e4%b8%ad%e5%8d%8e%e4%ba%ba%e6%b0%91%e5%85%b1%e5%92%8c%e5%9b%bd%e5%88%91%e6%b3%95%ef%bc%882015%e5%b9%b4%e4%bf%ae%e6%ad%a3%ef%bc%89/?lang=en> (with link to Chinese version).

fundamental principles or endangers national security , or *use the internet or the media to stoke discontent toward the Party and Government.*<sup>24</sup> (Emphases added)

In the hands of a Party-State controlled judiciary, the language of these newly introduced provisions is highly elastic. In practice the use of these provisions is likely to ‘complement’ the already available arsenal of criminal and other legal provisions hampering lawyers’ exercise of their profession. Such sweeping obligations imposed on law firms are all the more problematic because lawyers in some cases use (otherwise arguably questionable) means such as open letters about pending cases and peaceful online demonstrations about procedural violations, in order to overcome inherent weaknesses of the judicial process, such as violations of the right of access to lawyers of one’s own choice, the lack of publicness and openness of judicial proceedings, and what a scholar has aptly described as the principle of Chinese [judicial dependence](#).<sup>25</sup> As especially the last quoted clause shows, law firms are essentially under obligation to ensure that their staff politically censor themselves. Noncompliance puts the firms’ registration and hence their very existence at risk.

Beyond the regulatory regime and the rules of criminal law, lawyers who take on criminal defence cases or other cases involving confrontation with the Party-State’s security apparatus have always been at risk of wider persecution, including violence, especially if they insist on compliance with legal rules the authorities are unwilling to follow, such as rules safeguarding the right to file cases, securing their access to case files and defendants in custody; if they refuse to comply with informal orders and instructions from the authorities; or if they make complaints about government illegality or criminality.

Beatings of lawyers by court personnel [have occurred](#); they meant that while Lei Yang’s, the young environmental activist’s unexplained death in custody was a shock, it fit in with what human rights lawyers had learned to expect. For example, in June 2016 Nanning, Lawyer Wu Liangshu was beaten and had most of his business suit torn off when questioning the necessity of undergoing an enhanced body check in one of Nanning’s district courts of law.<sup>26</sup> Perhaps more commonly, lawyers engaging in work that provokes the authorities will be [attacked by persons referred to as ‘unknown thugs’](#).<sup>27</sup> There can be a blurred line between these actors, a sort of obscurity which can in turn be exploited by the authorities. For example, one lawyer in one police interview was explicitly threatened with ‘being Lei Yang’ed’ if he failed to comply with instructions; he bravely reported this later via the social media.<sup>28</sup>

As already mentioned earlier on, moreover, some lawyers have been subjected to even more severe measures such as enforced disappearance and torture, as well as criminal convictions and incarceration under various detention systems (the line between these two is becoming increasingly blurred). I discussed the example of Lawyer Gao Zhisheng eleven years ago in these pages.<sup>29</sup> A pioneer of human rights lawyering in China, he later suffered brutal torture and long term detention at the hands of the police, who on the occasion of his

---

<sup>24</sup> 律师事务所管理办法 [Regulation on the Management of Law Firms], promulgated by edict 133/2016 of the Ministry of Justice on 6 September 2016, available at [http://www.gov.cn/gongbao/content/2016/content\\_5109321.htm](http://www.gov.cn/gongbao/content/2016/content_5109321.htm).

<sup>25</sup> Li Ling, ‘The Chinese Communist Party and People’s Courts: Judicial dependence in China’, *American Journal of Comparative Law* 64:1 (2016) 4.

<sup>26</sup> Stephen McDonnell, ‘The Chinese lawyer who had his clothes ripped off in court,’ *BBC News*, 7 June 2016, <http://www.bbc.co.uk/news/blogs-china-blog-36466485>. The article contains a picture of Lawyer Wu wearing the remnants of his suit with his bare leg and underpants showing.

<sup>27</sup> Li Jiayu, ‘Mob storms into hotel, beats up two defense lawyers,’ *Global Times*, 2011, 20 July 2011, <http://www.globaltimes.cn/content/666978.shtml>.

<sup>28</sup> Social media post, on file with the author.

<sup>29</sup> Eva Pils, ‘Asking the Tiger for His Skin: Rights Activism in China,’ Vol XXX (2007) *Fordham International Law Journal*, 1209 -1287.

first torture experience told him that he would be given the same ‘treatment’ as the clients he had sought to defend by exposing their torture in open letters published online.

Again, the use of state-centred violence, too has intensified and become more brazen under Xi Jinping, which saw a particularly severe and extensive [lawyer crackdown](#) that is still ongoing as of this writing. Beginning in July 2015, some three hundred lawyers and legal assistants were rounded up and subjected to coercive questioning by the authorities.<sup>30</sup> The majority were released after promising not to become active in advocacy for a small number of lawyers who have since suffered secret detention, and some of whom have been convicted of political crimes. Of those who were forcibly disappeared or held under extremely permissive rules on ‘residential surveillance in a designated location,’ some, such as Lawyer Wang Quanzhang, have not come back at all yet. Among those who came back, or were formally punished and could be visited in prison, Li Chunfu, was [diagnosed with serious mental illness](#) the following day.<sup>31</sup> A few days later, Lawyer Xie Yang provided a detailed account of his torture to his defence lawyer, who decided to publish the news.<sup>32</sup> By July 2017, it had emerged that some six detainees claimed to have been forcibly drugged. One of them commented in a conversation in July 2017 that the forced drugging, in particular,

‘...made you think you were finished...you couldn’t know [what you’d been given] and so you thought, for sure they want to kill you. You won’t get out of here alive. It was only in there that I really understood what torture was.’<sup>33</sup>

The same month, Lawyer Wang Yu released a statement in which she described how she had been kept confined in a small box or cage, deprived of food, and tormented in various other ways during her detention.<sup>34</sup> And yet lawyers like Wang Yu were also wheeled out in front of television cameras, where they had to talk about their ‘crimes,’ admit guilt, profess to repentance, and praise and thank the Party-State authorities.

Wang Yu, for example, having been detained for over a year ‘on suspicion of state subversion,’ spoke to the media in what appeared to be a holiday resort, renouncing her former advocacy, denouncing two foreign organisations<sup>35</sup> for human rights awards given to her earlier that year, and thanking and praising the authorities. Her boss Zhou Shifeng, at his trial, similarly admitted guilt and spoke of his deep gratitude toward the authorities that had already broadcast his statement of repentance shortly after his initial detention and held him

---

<sup>30</sup> Amnesty International, <https://www.amnesty.org/en/latest/campaigns/2016/07/one-year-since-chinas-crackdown-on-human-rights-lawyers/>.

<sup>31</sup> Wang Qiaoling, ‘Chinese Rights Lawyer Li Chunfu Mentally Disturbed and Physically Ruined After Abuse in Custody,’ translated by Cao Yaxue, *ChinaChange*, 13 January 2017, available at <https://chinachange.org/2017/01/13/chinese-rights-lawyer-li-chunfu-mentally-disturbed-and-physically-ruined-after-abuse-in-custody/>.

<sup>32</sup> Xie Yang and Chen Jiangang, ‘Transcript of Interviews with Lawyer Xie Yang (3) – Dangling Chair, Beating, Threatening Lives of Loved Ones, and Framing Others,’ translated by Cao Yaxue, *ChinaChange*, 21 January 2017, <<https://chinachange.org/2017/01/21/transcript-of-interviews-with-lawyer-xie-yang-3-dangling-chair-beating-threatening-lives-of-loved-ones-and-framing-others/>>.

<sup>33</sup> Eva Pils, ‘A new torture in China,’ *CPI Analysis guest blog*, 10 August 2017, <https://cpianalysis.org/2017/08/10/a-new-torture-in-china/>.

<sup>34</sup> Wang Yu, ‘王宇、包龙军：致敬！“709”案辩护人 [Wang Yu, Bao Longjun: Saluting the “709” criminal defenders!],’ *Botan Web*, 12 July 2017, <<https://botanwang.com/articles/201707/%E7%8E%8B%E5%AE%87%E6%9B%9D%E5%85%89%E9%85%B7%E5%88%91%E3%80%80%E6%84%9F%E8%B0%A2%E5%85%B3%E6%B3%A8%E4%BF%83%E5%A4%84%E5%A2%83%E6%94%B9%E5%96%84.html>>.

<sup>35</sup> Namely, the American Bar Association and the Ludovic Trarieux Human Rights Prize Committee.



*incommunicado* for over a year.<sup>3637</sup> To prepare for this strange performance, the authorities had placed Zhou under ‘residential surveillance in a designated location’ without access to legal counsel, ensured his ‘representation’ by a lawyer they had chosen and procured a note, handwritten by Zhou, stating that he did not wish his family to attend the trial.<sup>38 39</sup> Without having further insight into this trial, another lawyer told me how his trial was negotiated, scripted and, indeed, rehearsed.<sup>40</sup> The effects of these displays were further amplified by accompanying articles in the official news media, as well as further audio-visual materials officially circulated video-clips that cast human rights advocates as enemies of the People and the State.<sup>41</sup>

Of course, the vast majority of lawyers, and in particular those in commercial practice, are not affected by the more intense repressive measures outlined here; and their professional experience, especially if like the vast majority of lawyers they do not take on criminal cases is remote from that of the human rights lawyer victims of these human rights violations. But in some contrast with how the Chinese and international legal profession in China tend to be discussed by professionals and academics, there is no neat and clear dividing line. There can be no such line, not least because legal work does not always neatly fall into separate categories; because many cases can, for a variety of reasons, engage the abuse-prone criminal justice and/or Party investigation system or become ‘sensitive’ for variety of reasons; and because the Party-State system deliberately uses the social and professional networks on which lawyers depend to influence their actions – for example, it uses the law firm and its head as a tool to pass on instructions to individual lawyers, as when it instructs a ‘boss’ to demand that a particular law firm employee cease to represent a particular client.

Indeed, there is every indication that the control of the legal profession is not only intensifying with regard to perceived ‘subversive’ elements within the profession, but also being extended further to all its members, as a few further examples of new practices will illustrate. The first, perhaps most powerful and pervasive way in which this is achieved is

<sup>36</sup> Vivienne Zeng, ‘Human rights lawyers targeted in unprecedented crackdown,’ *Hong Kong Free Press*, 13 July 2015, <https://www.hongkongfp.com/2015/07/13/human-rights-lawyers-targeted-in-unprecedented-crackdown/>.

<sup>37</sup> ‘Esteemed Presiding Judge, judges, state prosecutors and my two esteemed defence lawyers: you have all been put to so much trouble! Through today’s trial, I have come to realise fully what crimes I have committed, and the harm my actions have caused to the Party and the Government. I hereby express my deepest repentance toward our government! [Bows.] I trust that a trial so replete with fairness and justice and the rule of law as this will result in a fair verdict, and that it shall stand the test of history and legal scrutiny. I admit guilt and repent, admit guilt and subject myself to the law; and I will never appeal!’<sup>37</sup> ... I thank the court! I thank the prosecutor! I thank my lawyers!’ Translation has made use of Chinese-English excerpt available at Human Rights in China (HRiC), ‘Annotated Excerpts from Hu Shigen and Zhou Shifeng’s Trial Transcripts,’ 12 August 2016, <http://www.hrichina.org/en/annotated-excerpts-hu-shigen-and-zhou-shifengs-trial-transcripts>.

<sup>38</sup> Handwritten letter by Zhou Shifeng 天津二中院：周世锋向法院书面请求不希望亲友旁听庭审, <http://legal.people.com.cn/n1/2016/0803/c42510-28608968.html> and <https://botanwang.com/articles/201608/%E5%A4%A9%E6%B4%A5%E4%BA%8C%E4%B8%AD%E9%99%A2%EF%BC%9A%E5%91%A8%E4%B8%96%E9%94%8B%E4%B8%8D%E5%B8%8C%E6%9C%9B%E4%BA%B2%E5%8F%8B%E6%97%81%E5%90%AC%E5%BA%AD%E5%AE%A1.html>. In another case, the author learned that the 709 target had been explicitly requested to ‘de-invite’ their family.

<sup>39</sup> See also Jun Mai, ‘How Chinese rights lawyer’s courtroom mea culpa went off script,’ *South China Morning Post*, 22 August 2016, <http://www.scmp.com/news/china/policies-politics/article/2006700/how-chinese-rights-lawyers-courtroom-mea-culpa-went>: ‘In a 10-minute final statement, the Peking University law school master’s degree holder praised China’s legal system, saying it was “so much beyond the Western rule of law”, and that the trial would “stand the test of the world”. The praise was not included in the official transcript published hours later.’

<sup>40</sup> #300-17-1.

<sup>41</sup> 颜色革命 Color Revolution, available at <https://www.youtube.com/watch?v=8qBt-i9ErSY>, English translation available at <http://chinadigitaltimes.net/2016/08/hk-activist-branded-us-backed-separatist-govt-video/>.

through the licencing system, which affects all lawyers. In a situation where by nearly everyone's admission, by anecdotal accounts and according to official statements, corruption in the judicial profession and more widely amongst actors in the legal system, has long been endemic, lawyers' independence from the Party-State is adversely affected as it makes them vulnerable.<sup>42</sup> Scholars investigating how corruption affects the legal profession have, for example, described [practice of 'nurturing judges' \(yang faguan\)](#) – potentially meaning anything from taking them to restaurants to money bribes – as widespread, and viewed as common and acceptable, at least in some locations.<sup>43</sup> For example, lawyers encounter a world of 'state capitalism' where legal rules of corporate governance are routinely disrupted by the Party exercising control.<sup>44</sup> Defenders of the strict licensing system requiring an annual re-assessment to keep one's licence would contend that it is necessary to weed out corrupt lawyers; but from the perspective taken here, this system is itself corrupted, in ways indicated above; it is incompatible with rule of law principles.

Second, partly claiming to respond to malpractices in the legal profession and wider legal system, the authorities are rolling out ever more comprehensive programmes of surveillance include the so-called [Social Credit System](#).<sup>45</sup> Once this programme is in place nationwide, all lawyers, along with all other Chinese citizens, will be given a 'social credit' score by the State, and this score will affect questions such as [whether they can travel abroad](#).<sup>46</sup> (An additional issue is government [plans 'to rank lawyers by seniority and restrict \[the handling of\] key cases to "qualified" advocates.'](#))<sup>47</sup>

Lastly, the Party has not only for several years pursued a goal of achieving 'total coverage' of Chinese law firms' establishment of Party branches through 'professional Party-

<sup>42</sup> Commenting on corruption within China's court system, Supreme People's Court President Zhou Qiang said, for example, that ["the situation is grim and the task arduous."](#) In March 2016, after a year in which, according to the same [official report](#), a total of 2,424 judicial staff were investigated and punished over graft, he said, ["we will continue to put high pressure on corruption."](#) Every year, the Annual Work Report by the Supreme People's Court President (such as Zhou Qiang (周强), '最高人民法院工作报告-- ——2017年3月12日在第十二届全国人民代表大会第五次会议上 [Supreme People's Work Report --- submitted at the Fifth Plenary Meeting of the Twelfth NPC on 12 March 2017], available at ([http://www.npc.gov.cn/npc/xinwen/2017-03/15/content\\_2018938.html](http://www.npc.gov.cn/npc/xinwen/2017-03/15/content_2018938.html)) includes a rundown of disciplinary procedures, investigations, prosecutions and convictions for judicial corruption-related crimes, such as 'bending the law' and bribe-taking; and professional judges have been quitting in rather large numbers. See Sina.com, '法官离职潮背后:丰满的理想抵挡不住现实骨感 [What lies behind the wave of judges quitting: fine ideals cannot withstand sense of realism]' (24 July 2016), available at <http://news.sina.com.cn/c/nd/2016-07-24/doc-ifyuhukz0907342.shtml>.

<sup>43</sup> Outside litigation contexts, the situation is not necessarily better Liu Sida 2011. "Lawyers, State Officials, and Significant Others: Symbiotic Exchange in the Chinese Legal Services Market." *China Quarterly* 206: 276-293; see also Terence C. Halliday and Sida Liu, *Criminal Defence in China: The Politics of Lawyers at Work* (Cambridge: Cambridge University Press, 2016).

<sup>44</sup> Wang, JiangYu, *Corporate Governance in China: The Law and Its Political Logic* (October 19, 2016). Routledge Handbook of Corporate Law ed. Roman Tomasic. (Abingdon: Routledge, November 2016), Chapter 11, pp. 183-211.. Available at SSRN: <https://ssrn.com/abstract=2970882>

<sup>45</sup> Chen, Yongxi and Cheung, Anne S. Y., The Transparent Self Under Big Data Profiling: Privacy and Chinese Legislation on the Social Credit System (June 26, 2017). Vol. 12, No. 2, *The Journal of Comparative Law* (2017) 356-378; *University of Hong Kong Faculty of Law Research Paper* No. 2017/011, <https://ssrn.com/abstract=2992537>; Jeremy Daum, 'China's Social Credit System,' <https://chinadigitaltimes.net/2018/01/giving-credit-jeremy-daum-chinas-social-credit-system/>; Merics, 'China's Social Credit System,' <https://www.merics.org/en/microsite/china-monitor/chinas-social-credit-system>.

<sup>46</sup> Jay Stanley, 'China's Nightmarish Citizen Scores Are a Warning For Americans,' *ACLU*, 5 October 2015, <https://www.aclu.org/blog/privacy-technology/consumer-privacy/chinas-nightmarish-citizen-scores-are-warning-americans?redirect=blog/free-future/chinas-nightmarish-citizen-scores-are-warning-americans>.

<sup>47</sup> Jun Mai, 'Justice fears over reform plans to rank China's lawyers,' *South China Morning Post*, 17 November 2015, <http://www.scmp.com/news/china/policies-politics/article/1880166/plan-chinese-lawyers-be-ranked-sparks-fears-over>.

building work.<sup>48</sup> In As the abovementioned Ministry of Justice Regulation indicates, Chinese lawyers and law firms are increasingly required to aid the Party-State in ensuring political self-censorship. Through extensive reporting obligations in the context of the re-assessment system as well as the penetration of law firms by the Party, the wider Chinese legal profession is thus also affected by a process of intensified ‘politicisation,’ or intensified Party control.

In sum, the arsenal of rules and measures by which the Party-State controls the domestic Chinese legal profession is impressive, and it has been further extended under Xi Jinping. The suggestion that lawyer repression in China was limited to a handful of marginalised human rights lawyers is inaccurate, and there are plenty of trajectories whereby undue pressure on legal professionals is extended to the wider, including the commercial legal profession.

### *Transnational implication*

When foreign lawyers go to work in China, they naturally come under the jurisdiction of domestic Chinese law. When Chinese lawyers work abroad, they are required to obey local laws, too. In both cases, however, they do not entirely shed the system of their jurisdiction of origin: foreign lawyers generally remain bound by certain professional standards grounded in the values of the legal system that admitted them to the profession. Chinese lawyers remain bound not only by the rules of their profession narrowly speaking; they also retain their status as subjects of the Party-State and remain in important ways subject to its control and influence. As shown in the previous section, such control and influence take a variety of forms, not all of which are legal even on the terms of the domestic Chinese legal system. Moreover, domestically, lawyers and law firms can be both victims and complicit supporters of repression. As argued in the following, the Chinese system’s transnational effects in some ways reflect its domestic traits. In particular, foreign lawyers and law firms, too, are at risk of becoming complicit in the repressive system, even though a special system of rules has been devised for them, and even though they are barred from directly competing with their Chinese peers.

The regulatory regime governing foreign law firms in China is based on the 2001 [Regulation on the Management of Representative Offices of Foreign Law Firms in China](#) (hereinafter ‘Representative Office Regulation’) and its 2002 [Interpretation Rules](#).<sup>49</sup> (Law firms based in Hong Kong and Macau – which are separate jurisdictions from mainland China – are subject to [similar rules](#).) Formally, the Representative Office Regulations are secondary legislation, and are also governed by the 2007 Law on Lawyers ([Article 58](#)).<sup>50</sup> Under these rules, any international law firm setting up an office in China will be required to go through a licencing system for setting up a representation; and it cannot ‘practice Chinese law,’ not even by employing Chinese lawyer staff. The [Representative Office Regulation](#) requires that such representative offices and individual representatives (lawyers) shall, *inter alia*,

---

<sup>48</sup>This is discussed in Pills, *China’s Human Rights Lawyers*, chapter 5. .

<sup>49</sup> 外国律师事务所驻华代表机构管理条例 [Regulations on the Administration of Foreign Law Firms' Representative Offices in China] (2001), <http://www.lawinfochina.com/display.aspx?lib=law&id=2169>; 司法部关于执行《外国律师事务所驻华代表机构管理条例》的规定 [Provisions of the Ministry of Justice on the Execution of the Regulations on the Administration of Foreign Law Firms' Representative Offices in China], <http://www.lawinfochina.com/display.aspx?lib=law&id=2402&CGid>.

<sup>50</sup> 中华人民共和国律师法 [PRC Law on Lawyers], passed on 28 October 2007, effective as of 1 June 2008.

See for the Chinese text [http://www.gov.cn/flfg/2007-10/28/content\\_788495.htm](http://www.gov.cn/flfg/2007-10/28/content_788495.htm), and for an English translation <http://www.cecc.gov/pages/newLaws/lawyersLawENG.php>

‘respect Chinese laws, regulations and rules, abide by *Chinese lawyers' professional ethics and professional discipline*, and not harm China's national security or social public interests.’ Article 3, emphasis added)

The language of ‘professional ethics and professional discipline’ creates a link to domestic standards, whose breaches, if domestic lawyers are found guilty of them, would apparently be sanctioned in accordance with the [Representative Office Regulation](#). Article 24 of the [Representative Office Regulation](#) stipulates that when foreign lawyers engage in conduct endangering national security or public order or ‘social management order’ (a vague term), they too may be subject to criminal or administrative punishment, although it does not specify under what administrative rules.

What is perhaps of more immediate practical relevance is that all lawyers working in such representative offices are barred from actually engaging in ‘practicing Chinese law,’ (Article 15 of the [Representative Office Regulation](#) lists the activities they are allowed to engage in, explicitly excepting ‘Chinese law services (*Zhongguo falü shiwu*).’ In practice, it is virtually impossible to operate in China without in some way engaging in some way in an interpretation of Chinese law while providing services to clients. Any specific activity may or may not constitute ‘provision of Chinese law services’ (on detailed questions, see e.g. [Godwin, 2009](#))<sup>51</sup> – what matters, according to informal and confidential conversations held with foreign lawyers of over ten years of experience of practicing in law firm offices in China, is that this requirement hangs ‘like a sword of Damocles’ over each Representative Office. Falling afoul of the requirement can result in suspension or revocation (*zhuxiao, diaoxiao*) of the licence (permit) to practice, in accordance with Article 26 (1) of the [Representative Office Regulation](#); and one lawyer observed that they did not think that any effective legal challenges to licence revocation or means of redress would be available in practice in such a case. Low confidence in the possibility of challenging unfair interpretations of such rules, due to the weak rule of law environment, can only enhance their chilling effect. (Whether the current restrictions imposed on foreign lawyers and law firms in a legal services market perspective are in compliance with China’s international obligations, in particular under World Trade Organisation (WTO) rules, has been a matter of debate for some time. After China’s accession to the WTO, some argued that the WTO presented challenges to the domestic legal services market ([Lu, 2002](#)) and that China was deviating from its WTO commitments ([Heller, 2003](#)).<sup>52</sup> The focus of the present discussion is not on restrictions of the legal services market as such but, rather, on the effects existing restrictions have on the autonomy of the legal profession.)

Partly in response to such pressure, but mainly for wider commercial reasons, a growing number of foreign law firms is creating loosely structured mergers. There is, for example, the form of the Swiss *Verein* (a representative example for this sort of merger is that of Dentons and Dacheng. The firm in China now uses both names ([大成 Dentons](#)).<sup>53</sup> The *Verein* merger retains separate local profit pools for the two entities (the Chinese and foreign

---

<sup>51</sup> A Godwin, ‘The Professional ‘Tug of War’: The Regulation of Foreign Lawyers in China, Business Scope Issues and Some Suggestions for Reform,’ (2009) *University of Melbourne Law Review* 5.

<sup>52</sup> Jane Heller ‘China’s new foreign law firm regulations: a step in the wrong direction,’ *Pacific Rim Law & Policy Journal* (2003) 751-780; Rachel E Stern, The Outpost Office: How International Law Firms Approach the China Market, 41 *Law & Social Inquiry* 184 (2016).

<sup>53</sup> The website of Dentons Dacheng can be accessed at <https://www.dentons.com/zh>.



firms).<sup>54</sup> The *verein* structure cannot necessarily avoid reputational liability for one's partner, however, as briefly discussed with regard to Dentons/Dacheng earlier on.

Some new local regulations have created further opportunities for Chinese and foreign law firms to create joint offices. In particular, administrative regulations created by the Shanghai Bureau of Justice, allow for what is called '[reciprocal assignment](#)' (*hupai*) of legal consultants between a Chinese and a foreign firm, and for '[affiliated operation](#)' (*lianying*) of a Chinese and a foreign firm. These new opportunities would appear to reduce the risks of 'providing Chinese law services' by normalising such activities but also bring some new problems, since there would be even greater proximity to the obligations and liabilities of domestic Chinese lawyers, and thus greater risks of complicity with Party-State illegality or crime.

In parallel with this, the interaction between domestic and foreign lawyers and law firms has come within the ambit of Xi Jinping's global expansion project called the 'Belt and Road Initiative.' This initiative has not only led to ambitious attempts to re-model law on anti-liberal lines and weaken the international human rights law regime by reinterpreting its fundamentals, such as human rights.<sup>55</sup> It has also led to numerous subordinate initiatives and organisations including a new "Belt and Road" Cross-border Lawyers' Talent Pool whose establishment indicates that ACLA, as an organisation of the Party-State, intends to play a key role in the selection of foreign lawyers invited to participate in BRI projects.<sup>56</sup>

In sum, international law firms in China operate at the sufferance of authorities that have become increasingly intolerant of autonomous legal practice over the past few years. They are required to follow a rule of 'not practicing Chinese law' that stifles their activities and makes them vulnerable to pressure. While the regulatory framework is somewhat obscure, these firms moreover seem to be subjected to explicit requirements to ensure that their staff censor themselves politically, avoiding any criticism of the government or the system under which they operate. Taking these factors into account, it is perhaps not surprising that when the authorities launched their latest, and thus far biggest, crackdown on Chinese human rights lawyers, *The American Lawyer* reported, '[In China's crackdown on rights lawyers, big law says little](#).'<sup>57</sup> (In fact, it appears that Big Law said nothing at all publicly, leaving expressions of concern and protest to be produced by professional associations and their representatives.)

---

<sup>54</sup> 'A *verein* is an association of independent legal entities for specifically defined purposes — generally, marketing and branding in nature. Financial separation and local entity independence of control for each *verein* member law firm is confirmed in the *verein*'s governing documents, and reaffirmed in dedicated disclaimer and notice sections prominently featured on the website of every *verein* member, along with the important note that the *verein* itself does not practice law anywhere.' Edwin B. Reeser and Martin J. Foley, [Are verein-style law firms ignoring the fee-splitting ethics rules?](#), 1 October 2013.

<sup>55</sup> Xinhua Net, '首届“南南人权论坛”《北京宣言》 [First South-South human rights dialogue “Beijing Declaration”]', 8 December 2018, [http://news.xinhuanet.com/politics/2017-12/08/c\\_1122081753.htm](http://news.xinhuanet.com/politics/2017-12/08/c_1122081753.htm); Chinese Mission to the United Nations Office at Geneva, 'Win-Win Cooperation for the Common Cause of Human Rights,' 1 March 2018, <http://www.china-un.ch/chn/dbtzyhd/t1538411.htm>.

<sup>56</sup> The initiative is described as follows: 'At the event, the All China Lawyers Association announced the establishment of a “Belt and Road” Cross-border Lawyers' Talent Pool. 143 Chinese and foreign law firms and 205 Chinese and foreign lawyers became the Pools' inaugural members. It is reported that ACLA will further refine its management on the basis of different national systems and areas of professional specialisation and actively recommend outstanding foreign legal service personnel to participate in the assessment and arbitration organizations [评审、仲裁机构] of international economic and trade organizations, and to recommend foreign legal personnel to participate in investment in Chinese enterprises in countries and regions along the “One Belt and One Road”(...)’ ‘中国律协与“一带一路”沿线多国搭建法律服务合作网 [The All China Lawyers Association and the “One Belt, One Road” Multinational State Building Legal Services Cooperation Network],’ 24 June 2017 [http://www.xinhuanet.com/world/2017-06/24/c\\_1121203227.htm](http://www.xinhuanet.com/world/2017-06/24/c_1121203227.htm).

<sup>57</sup> '[In China's crackdown on rights lawyers, big law says little](#),' *The American Lawyer*, 24 July 2015, <https://www.law.com/almID/1202733049955/?sreturn=20180127060251>.



There are several problem areas of international (or transnational) legal services with a China element. A preliminary assessment suggests that major areas of concern include the following, listed below without any claim of having undertaken a systematic study of these issues – rather, they are listed because practitioners have pointed them out as potential problem zones in informal conversation:

The first is (client) confidentiality, an issue encompassing different sets of rules that govern contractual obligations of confidentiality, professional ethics regarding privileged information, and data protection and privacy rights. Lawyers pointed out that electronic surveillance and data-selling are rife in China, and that Chinese law firms in general feel unable to refuse requests to relinquish information to the police or other authorities requesting them. As a result, they said, the promises made to clients that their information could be kept confidential are spurious. Academics, on the other hand, point to the generally weak legal protection in this area. Thus Chen and Cheung write that

‘...[P]ersonal data as a general subject has yet to be clearly defined and effectively protected under Chinese law [and that] rights that data subjects are entitled to under a personal data protection regime are rarely mentioned in China and are, at best, provided for under scattered sector-specific laws...Given the inadequate protection afforded to personal data in China, the country is an ideal social laboratory for big data experimentation, data intelligence and mass surveillance.’<sup>58</sup>

Discussing the already-mentioned ‘Social Credit’ system being rolled out, these authors point out that the authorities in charge can gather records also from ‘industry associations,’ which may well be understood to include the lawyers’ associations at various levels, as well as receive information supplied by private individuals, and they discuss the many ways in which private entities may gain access to and use information on ‘social credit’ or ‘public credit’ gathered in this way.<sup>59</sup> Additionally, it is recognised that the Party-State uses technology to practice involuntary cyber-surveillance.<sup>60</sup> Even though it is impossible at this stage to gain a detailed understanding of the practices that may arise under these Party-State policies and practices, it is not difficult to see that both the provision and the use of ‘public credit information’ may be in tension with the obligations of lawyers and law firms under rules devoted to protecting confidentiality, privacy, and personal data, both with regard to clients, and with regard to employees and colleagues.

It is imaginable that such issues might arise with regard to foreign law firms operating in China, as well as with regard to Chinese law firms operating in western countries. To give a randomly chosen example of the latter case, lawyers working with King & Wood Malleson are listed as working in both the London and Shanghai branches of the firm. Of course, the Shanghai branch of this firm has established a Party cell.<sup>61</sup> It is not possible, without insider knowledge, to determine what the role of this Party cell is, what decisions, if any, it makes or passes on from the higher echelons of the Party leadership; what study sessions it organises, and overall what the influence of the Party on the operation of the law firm is. But there can

---

<sup>58</sup> Chen Yongxi and Cheung, Anne S. Y., ‘The Transparent Self Under Big Data Profiling: Privacy and Chinese Legislation on the Social Credit System,’ 26 June 2017, Vol. 12, No. 2, *The Journal of Comparative Law* (2017) 356-378; *University of Hong Kong Faculty of Law Research Paper No. 2017/011*, <https://ssrn.com/abstract=2992537> at 357.

<sup>59</sup> *Ibid* at p.366.

<sup>60</sup> Maya Wang, ‘China’s Dystopian Push to Revolutionize Surveillance,’ August 2017, Human Rights Watch, <https://www.google.co.uk/search?q=cyber+surveillance+china&oq=cyber+surveillance+china&aqs=chrome..69j57.4884j0j4&sourceid=chrome&ie=UTF-8>.

<sup>61</sup> Lüxinshe (律新社), ‘献礼十九大！上海哪 33 家律所的党建工作走在了前列？,’ 19 October 2017, <http://www.lvxinweb.cn/detail.aspx?wid=35&aid=6135&openid=loseopenid>.

be no reasonable doubt that having a Party cell has a powerful symbolic significance, at least. It might serve to remind lawyers licenced under the Chinese system of their legal obligation to show loyalty to the Party and to serve a system in which the principle of Party leadership has been declared to be identical with the principle of ‘socialist rule of law with Chinese characteristics.’<sup>62</sup>

A second issue is the interaction of transnational law firms with inherently abusive systems of discipline and criminal punishment in China. For example, lawyers have pointed out that there are – and I have heard of – cases in which the criminal justice system was apparently abused by commercial actors seeking to put pressure on competitors or opponents. In China, the issue is recognised and discussed as one of ‘turning private conflicts into criminal cases.’ It can involve, for example, taking a business competitor or opponent in a business lawsuit into police custody as a ‘favour’ from the police;<sup>63</sup> under the revised rules of criminal procedure, this might include the use of ‘residential surveillance in a designated location’ or, as it has been dubbed, ‘non-residential residential surveillance’ of the target individual. Where such practices do occur, they can raise the very difficult question of how far legal representatives should go in exposing or challenging them.

The abuses, detailed earlier, against professional lawyer colleagues are different yet raise somewhat similar issues and may serve as a second example. Even where a lawyer or law firm has no obligations toward a detainee as a client they may have obligations of care or solidarity as an employer or colleague. Yet, the system provides many incentives against exposure or challenges, and incentives for participation in persecution, as has been discussed elsewhere. To give just one example, when human rights lawyer Pu Zhiqiang tried to expose abuses occurring in the Party-governed system for ‘discipline and inspection’ typically affecting Party members, such as officials or CEOs of SOEs, who are suspected of corruption, he suffered severe persecution himself.<sup>64</sup> More widely, as set out above, the legal-political system has in recent years imposed ever more stringent rules requiring law firms to ensure that its staff not challenge the system in ways that would amount to stoking political discontent.

Due to the complexity and obscurity of abuses in the criminal justice system and parallel systems for discipline and punishment, it may be difficult to establish big law firms’ implication in abuses. But as the example, discussed at the outset, of Lawyer Peng Jiyue’s attempt to help in the Lei Yang case illustrated, commercial law firms are not isolated against criminal injustices by virtue of their status.

A third issue is potential threats arising from the already-mentioned fact of widely endemic corruption, be it with regard to the judiciary or more widely. As noted above, corruption in the judicial system, in particular, is a widespread problem. In theory, because they commit to ‘not practicing Chinese law,’ foreign law firms are somewhat shielded from the implications of such corruption; but through collaborative relationships, they may at least

---

<sup>62</sup> ChinaLawTranslate, ‘CCP Central Committee Decision concerning Several Major Issues in Comprehensively Advancing Governance According to Law,’ 28 October 2014, translation available at <http://chinalawtranslate.com/fourth-plenum-decision/?lang=en>.

<sup>63</sup> For a somewhat conservative analysis illustrating that the problem is widely recognised, see Yu Lujuan and Zheng Weihong (于禄娟, 郑伟红), ‘民事纠纷刑事化的根源及对策 [Turning private conflicts into criminal ones – causes and ways of tackling the issue],’ *People’s Forum*, 1 November 2013, [http://paper.people.com.cn/rmlt/html/2013-01/11/content\\_1195145.htm?div=-1](http://paper.people.com.cn/rmlt/html/2013-01/11/content_1195145.htm?div=-1); Xu Xin (徐昕), ‘在刑事法庭解决民事纠纷, 是法治的灾难,’ *Sohu.Com*, 15 November 2017, [http://www.sohu.com/a/204495601\\_570256](http://www.sohu.com/a/204495601_570256)

<sup>64</sup> Pu Zhiqiang, ‘Ningyuan Shuanggui’, Vimeo, February 2014, translated by HKU Media Project and ChinaChange, available at <https://vimeo.com/104070378>; Tom Phillips, ‘Pu Zhiqiang given three-year suspended sentence,’ *The Guardian*, 22 December 2015, <https://www.theguardian.com/world/2015/dec/22/pu-zhiqiang-chinese-human-rights-lawyer-sentenced-to-three-years>.

acquire knowledge of ongoing corruption. Similarly, they may risk becoming implicated in corrupt business practices of their clients.

The examples discussed here raise not only the question how, and in whose service, such firms work when they operate transnationally, (also) in business locations with autocratic legal systems. In the system governing Chinese lawyers, at least, the obligations imposed on domestic lawyers are incompatible with principled and professional service to the client and adherence to the rule of law, on any credible understanding of this concept. In some measure, Chinese lawyers are instead required to serve the Party-State, and such obligations and the problems they bring can affect collaboration with foreign legal professionals operating in China, as well as Chinese legal professionals operating abroad, as long as these individuals retain their status as lawyers subject to the standards of the ‘sender’ country. An even more urgent concern is the potential for direct clashes between rules and principles governing the legal profession ‘there’ and ‘here.’ This is briefly discussed in the following with regard to the example of ‘soft law’ human rights obligations and professional legal ethics obligations affecting UK lawyers who go to China to work there.

First, UK lawyers working abroad operate under standards of professional legal ethics. For example, the England and Wales Solicitors’ Regulation Authority’s [2013 Overseas Rules](#) require, *inter alia*, that solicitors practicing overseas ‘act with integrity’ (Principle 2) and ‘not allow [their] independence or the independence of [their] overseas practice to be compromised’ (Principle 3).<sup>65</sup>

Even if only considering the obligations imposed upon Representative Offices by the [Representative Office Regulation](#) in conjunction with rules of professional ethics and discipline governing Chinese lawyers, it is hard to see how Principles 2 and 3 can be honoured by lawyers admitted to practice in England and Wales who go to work in China, where they are, *inter alia*, required to take on responsibility for their colleagues’ censoring themselves so as not to ‘stoke discontent’ with the Party-State, and where the Party-State routinely interferes with the handling of certain kinds of legal case. Taking into account the wider problems of the Chinese legal system as it operates ‘on the ground,’ including the ‘problem areas’ briefly considered just above, there are even more reasons to be concerned about whether UK lawyers can ‘act with integrity’ and fend off situations in which their independence is compromised. (From its published sources, it is not at this point clear what the Law Society of England and Wales does to ensure that its Overseas Rules are adhered to. Given its effective status as regulator, some monitoring may reasonably be expected.)<sup>66</sup>

Second, according to the [UN Guiding Principles of Business and Human Rights](#) business enterprises should respect human rights. *Prima facie*, the designation ‘business enterprise’ applies to large transnational law firms, whose operation can have a direct impact on the well-functioning or otherwise of domestic legal systems and hence on concerns such as access to justice, the right to a fair trial, and (as seen in the above context) on lawyers’ rights of freedom of speech.

As the International Bar Association (IBA) recognises, professional bodies representing the legal profession should instruct their members on how the UNGP affect not only their

---

<sup>65</sup> Solicitors’ Regulation Authority, SRA Overseas Rules 2013, <http://www.sra.org.uk/solicitors/handbook/overseasrules/content.page>. See also Introduction to SRA Overseas Rules, published October 2017, <http://www.sra.org.uk/solicitors/handbook/introoverseasrules/content.page>.

<sup>66</sup> Additional concerns may arise with regard to the new solicitors’ qualifying examinations (SQE) under the Solicitors’ Regulation Authority (SRA), a branch of the Law Society of England and Wales. According to its recent [consultation paper](#), it seems possible that qualifying work experience could be gathered in China if it qualifies as a *‘regulated overseas jurisdiction’* providing ‘the opportunity for them to develop the practical legal skills that we would assess through the SQE. See Solicitor’s Regulation Authority Consultation Paper available at <http://www.sra.org.uk/documents/sra/consultations/sqe2-consultation-responses-list.pdf>.

clients, but potentially also them.<sup>67</sup> Certainly, the IBA is correct in stating that the UNGP cannot be taken to undermine any of the legal profession's most roles central to supporting the rule of law and human rights, including principles such as access to counsel.<sup>68</sup> However, precisely because the role of lawyers in upholding human rights is so central, there can surely be no objection to holding them to at least the same requirements as other businesses when it comes to refrain from undermining rule of law and human rights principles, or to acting to uphold these principles as best they can.

UNGP Principle no. 11 states that

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.<sup>69</sup>

Principle no 13 states,

Business enterprises should not undermine States' abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes.<sup>70</sup>

According to the Commentary provided by the Office of the High Commissioner for Human Rights, this means in particular that

The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) *Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships*, even if they have not contributed to those impacts.' (Emphasis added)<sup>71</sup>

Principle no 23 states,

In all contexts, business enterprises should: (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate; (b) *Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements*; (c) Treat the risk of causing or contributing to gross human rights abuses as a *legal compliance issue* wherever they operate.'<sup>72</sup>

Taken together, these principles clearly enunciate the idea that business enterprises have human rights responsibilities. These responsibilities not only commit them to carrying out what is termed 'human rights due diligence' to ensure that their responsibilities are not

---

<sup>67</sup> International Bar Association (IBA), 'Training Lawyers on Business and Human Rights. Importance of Business and Human Rights for Corporate Lawyers,' at <https://www.ibanet.org/LPRU/Business-and-Human-Rights-for-the-Legal-Profession.aspx>.

<sup>68</sup> IBA, 'A Practical Guide on Business and Human Rights for Business Lawyers,' 2016, [file:///C:/Users/Eva/Downloads/IBA\\_Practical\\_Guide\\_\(June%202016\).pdf](file:///C:/Users/Eva/Downloads/IBA_Practical_Guide_(June%202016).pdf) at p. 28.

<sup>69</sup> United Nations Office of the High Commissioner on Human Rights, 'UN Guiding Principles on Business and Human Rights,' [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

violated;<sup>73</sup> they also mean that in the face of a legal system that contravenes human rights principles, the business enterprise is not neutral but must ‘seek ways to honour’ human rights principles. As certain domestic law developments such as the introduction, in France, of tort law rules connecting to the UNGP well illustrate, moreover, the failure to honour these responsibilities may result in specific legal liabilities.<sup>74</sup>

## Tentative conclusion

If transnational law firms may have been unaware that they could not simply do business in China as if there were just a few, minor, technical variations on legal practice that needed to be taken into account, recent developments and discussions ought to have put them on notice. As this article has sought to show, China's legal system is fundamentally incompatible with rule of law principles adhered to by the legal profession in the UK and in other jurisdictions organised on liberal principles. In the former, lawyers, law firms and the lawyers' associations are expected to work in the service of a repressive Party-State. In the latter, lawyers' primary obligations are to law; and they are obligated to act in the best interest of their clients. Their independence is crucial; it is one of the principles that help protect those who might otherwise become defenceless against predatory practices of the state, or of the market.

Against this background of systematic undermining of law firm independence and their submission to a thoroughly compromising system of regulation and oversight, it is important that liberal systems whose legal professions increasingly operate transnationally not neglect the ordering of the terms of their lawyers' operations abroad. Of course, it is in a sense up to a host country, such as China, to set rules governing the foreign legal profession. But this does not absolve the countries from whose jurisdictions foreign lawyers come to China of the responsibility to insist that the host country honour its international commitments, and to create guidance for overseas legal practice compliant with basic rule of law principles. The [2013 Overseas Rules](#) well illustrate that this transnational responsibility has been recognised in principle. The question is, how is adherence to these standards ensured? Are problems with adherence addressed case by case? Do regulatory authorities in liberal jurisdictions engage with the more principled incompatibility issues such as those set out just above, and do they provide guidance on these to their lawyers? What regulatory mechanisms are in place to audit or investigate compliance with these standards on the part of transnational law firms operating abroad?

Based on the analysis presented in this article, it is clear that law firms operating in China ought to conduct robust ‘human rights due diligence’ to ensure compliance with the UN Guiding Principles, and that regulatory bodies in other countries, such as the England and Wales Solicitors' Regulation Authority, provide guidance on the compatibility of their [2013 Overseas Rules](#) with China's restrictive regulation and practices of extra-legal control of the legal profession. Beyond these immediate responsibilities, it would also be desirable that democratic parliaments such as the UK parliament scrutinise the effectiveness of the regulation of UK lawyers overseas practice, and the UK government's efforts, through

---

<sup>73</sup> *Ibid.*; John Gerard Ruggie (draft, June 2017), ‘The social construction of the UN Business and Human Rights Principles,’ *Corporate Responsibility Initiative Working Paper No. 67*. Cambridge, MA: John F. Kennedy School of Government, Harvard University; Business and Human Rights Resource Centre, ‘Human Rights Due Diligence,’ <https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-companies/type-of-step-taken/human-rights-due-diligence>.

<sup>74</sup> Ruggie, *supra*.



government level interaction, to ensure that UK lawyers in China are able to adhere to the professional standards they are bound to uphold.<sup>75</sup>

---

<sup>75</sup> In the context of a UK Parliamentary Inquiry concluded in January 2017, the author produced a submission for the NGO ‘Global Legal Action Network’ that set out some of the concerns discussed in this Article. The submission was published on the parliament website but there was no further response or engagement with the submission. See Global Legal Action Network (GLAN), Submission to the Commons Select Committee on Foreign Relations UK-China Relations Inquiry, 20 January 2017, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/uk-relations-with-china/written/45732.html>.